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Jodi Habush Sinykin

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AT A LOSS: THE STATE OF WISCONSIN AFTER EIGHT YEARS WITHOUT THE PUBLIC INTERVENOR'S OFFICE

JODI HABUSH SINYKIN*

I. INTRODUCTION

In the years since its elimination in 1995, citizens and state officials have made a concerted effort to restore the Wisconsin Public Intervenor's Office ("the Office"). The Office was a state entity created in 1967 by Republican Governor Warren P. Knowles to protect public rights in the state's natural resources and to ensure fair play and due process for matters of environmental concern. With every passing year since the Office's demise, the base of citizen and political support for its restoration has only grown larger. The 2003 Assembly Bill 46, seeking the reinstatement of a Public Intervenor's Office with all of the authority and powers possessed by the Office prior to 1995, represents the most current legislative effort in this respect.

As I outline in the pages of this Essay, the Public Intervenor's Office valiantly served Wisconsin's citizens from 1967 to 1995 by fulfilling its legislative mandate to champion public rights in the state's natural resources and to ensure government accountability in matters of environmental concern. The Office assisted hundreds of Wisconsin citizens every year with their environmental concerns by advising them on the use of existing local and state law to preserve their public rights and protect their families and property. Further, the Office repeatedly went to bat on behalf of Wisconsin citizens in courtrooms across Wisconsin, and even to the United States Supreme Court to protect and preserve the waterways, wildlife, lakefronts, and home

* Jodi Habush Sinykin attended the University of Michigan, where she graduated Phi Beta Kappa with a Bachelor of Arts degree in 1989. Ms. Habush Sinykin went on to Harvard Law School where she received her law degree in 1992. Ms. Habush Sinykin serves as the sole proprietor of the Milwaukee law firm HS Law. She has been retained by Midwest Environmental Advocates, a Madison-based, nonprofit environmental law center, to serve as of counsel on environmental matters and enforcement actions arising in Southeastern Wisconsin and has been recently appointed to serve on the Governor's Groundwater Management Advisory Council. This Essay was previously published by the Wisconsin Stewardship Network, Inc. in January 2004.

The author wishes to thank the following individuals whose assistance with this project was invaluable: Arlen Christenson, Thomas Dawson, Kathleen Falk, George Meyer, Melissa Scanlan, and Caryl Terrell.

communities of Wisconsin from environmental degradation.

Moreover, the Public Intervenor's Office served as an invaluable resource to Wisconsin legislators and agencies by providing both legal guidance and valuable assistance during the rule revision process and by building citizen and legislative support for the passage of the following landmark laws:

- Wisconsin's DDT Ban
- 1982 Employees' Right to Know Law
- Acid Rain Legislation
- Wisconsin's 1984 Groundwater Law
- Nonmetallic Reclamation Bill of 1994

In keeping with Wisconsin's populist roots, the Public Intervenor's government watchdog function not only protected Wisconsin citizens' right to an accountable and effective government but also championed the right to obtain complete and accurate information regarding issues of importance to the public good and to Wisconsin's natural resources. Finally, the Public Intervenor's Office provided an important benefit to Wisconsin's business community by reducing legal uncertainty, serving as an industry problem-solver, and protecting Wisconsin's tourism industry.

When the Public Intervenor's Office was dismantled as part of Governor Thompson's 1995-96 budget, there was an immediate public outcry over the prospective void created by the loss of these champions of the public trust and advocates of the state's natural resources. In the ensuing eight years, the impact of this void on government institutions, the state's natural resources, and the rights of Wisconsin's citizens has been great.

This Essay demonstrates that the demise of the Public Intervenor's Office has left Wisconsin's environment and many Wisconsin citizens in a vulnerable position. Without the Public Intervenor Office's advocacy efforts, the right of Wisconsin citizens to an accountable government has been placed in jeopardy. Citizens have had to go it alone in their efforts to oppose special interest provisions hidden within state budget bills, and without the checks and balances provided by the watchdog Intervenor's Office, Wisconsin's Department of Natural Resources ("DNR") has demonstrated significant shortcomings in the enforcement of state and federal environmental laws.

Furthermore, the Public Intervenor's ability to provide top-notch scientific, technical, and legal expertise has been sorely missed in matters of environmental importance to Wisconsin citizens. As a result, important environmental regulations and legislation have become stymied in committee. Indeed, Wisconsin citizens have been faced with the expensive and

overwhelming task of defending the Public Trust Doctrine in Wisconsin. In the face of powerful lobbyists, wealthy corporations, and a daunting state bureaucracy, citizens have been forced to spend thousands of their own dollars and countless hours to realize the quality of information and the level of legal assistance formerly provided by the Public Intervenor's Office at a cost of less than five cents per year for each Wisconsin citizen.

In sum, the far-ranging contributions of the Public Intervenor's Office and the detrimental void created by its elimination provide strong support for the prompt restoration of the Public Intervenor's Office in Wisconsin.

II. THE PUBLIC INTERVENOR'S OFFICE: AN ESSENTIAL COMPONENT OF WISCONSIN'S ENVIRONMENTAL HERITAGE

With more than 15,000 inland lakes, 33,000 miles of rivers and streams, 5.3 million acres of wetlands, 471,329 acres of state forests, and a location alongside the Mississippi River, Lake Michigan, and Lake Superior, Wisconsin has long enjoyed a reputation as a state rich in natural beauty and recreational opportunities.¹ But beyond its beautiful geography and natural resources, Wisconsin has been blessed with a legal tradition that has developed and preserved a legal theory known as the Public Trust Doctrine.² Rooted in the "common highways and forever free" language of Article IX of Wisconsin's Constitution, the Public Trust Doctrine has been best articulated by the Wisconsin Supreme Court as follows: "The right of the citizens of the state to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given financial rights."³

Wisconsin's adherence to the Public Trust Doctrine, along with the state's populist roots,⁴ has culminated in Wisconsin's stature as an environmental leader and in a state heritage as the proud protector of its citizens' rights to the enjoyment and protection of their state's natural resources and to an accountable government.

An essential component of Wisconsin's environmental leadership position was the Public Intervenor's Office. The Office was created in 1967 by

1. David Johnson & Laura Chern, *Walking on Water*, WIS. NAT. RESOURCES, June 1998, at 6; Wisconsin Department of Tourism, Wisconsin Tourism Facts, http://agency.travelwisconsin.com/PR/Tourism_Facts/Facts.shtml.

2. *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 53 N.W.2d 514 (1952).

3. *Id.* at 511-12, 53 N.W.2d at 522.

4. Russell Feingold, *Who You Callin' a Populist, Buddy?*, in PROGRESSIVE POPULIST (1999), <http://www.populist.com/4.94.htm> ("Part of that [populist] legacy is 'the Wisconsin idea,' the marshaling of the resources of government, business, academia, and citizens' groups to come up with solutions to social and economic challenges.").

Republican Governor Warren P. Knowles as part of a large scale effort to reorganize Wisconsin's executive branch. The Office was introduced by the Kellett Bill,⁵ legislation that emerged from over a year's worth of planning, public hearings, and debate. The Kellett Bill had two major effects: First, it merged the Conservation Department and the Department of Resource Development, and second, it created the Office of the Public Intervenor. Under the Kellett Bill's mandate, the Public Intervenor's Office was to "protect public rights in water and other natural resources" and ensure fair play and due process for matters of environmental concern in the bureaucratic decisionmaking process of Wisconsin agencies.⁶ Importantly, the Office's role was constructed to be distinct from that of any other state entity, as it was to intervene on behalf of the public in the court system, in administrative hearings, and before legislative and rule-drafting committees in order to safeguard the rights shared by all Wisconsin citizens under state law.

Over the course of its twenty-eight year history, the Public Intervenor's Office remained a lean and economical state entity, consisting at its height of only two attorneys, limited clerical support, and the occasional addition of short-term intervenors assigned to particular projects as needed.⁷ Indeed, the office budget of the Wisconsin Public Intervenor's Office totaled only \$232,000 in 1994, amounting to an infinitesimally small percentage of the state's \$15.5 billion budget for that year.⁸ *The entire Public Intervenor's Office cost the citizens of Wisconsin less than a nickel each year per person.*⁹

5. WIS. STAT. § 165.07 (1993), *repealed by* 1995 Wis. Act 27, § 4450(b), *replaced with* WIS. STAT. § 23.39 (1995), *repealed by* 1997 Wis. Act 27, § 783(x) [hereinafter Kellett Bill]. The Kellett Bill was amended in 1983 to expand the powers of the Public Intervenor's Office.

6. Arlen Christenson & P. Dubois, *Public Advocacy and Environmental Decisionmaking: The Wisconsin Public Intervenor*, in INST. GOVERNMENTAL AFF. & INST. ECOLOGY, ENVTL. QUALITY SERIES NO. 26, at 10 (1977).

7. In 1977, the Public Intervenor's Office, working with University of Wisconsin Law School Professors Arlen Christenson and James McDonald, created the Public Intervenor Clinical Law Program. As outlined by Assistant Attorney General Thomas Dawson, who served as a Public Intervenor from 1976 to 1995, this program recruited six to eight law students per semester to practice environmental law under the supervision of the public intervenors and Professors Christenson and McDonald. Without pay, but receiving law school credits for their work, the students investigated citizen complaints, researched the law, and delivered advice to hundreds of citizens. They were further responsible for investigating permit applications to the Army Corps to fill wetlands, which involved interviewing applicants, obtaining facts, and assessing alternatives to avoid wetland destruction. In addition, the students wrote letters to the Department of Natural Resources to deny or condition water quality certification for the federal wetland fill permit applications. As a result of the Public Intervenor Clinical Law Program, the taxpayers of Wisconsin received thousands of dollars of valuable work at no expense to the state.

8. *Didn't Taxpayers Save Money by Eliminating the Intervenor's?*, Wisconsin Stewardship Network, <http://www.wsn.org/issues/PIOsavemoney.html> (last visited Oct. 25, 2004).

9. Arlen Christenson, *The Vital Role of the Public Intervenor*, Wisconsin Stewardship Network, <http://www.wsn.org/issues/PIOchristenson.html> (last visited Oct. 25, 2004).

As a state office, the Public Intervenor's Office was accountable to both the Office of the Attorney General and its own Citizen Advisory Committee. By statute, the Citizen Advisory Committee for the Public Intervenor's Office consisted of nine citizens with solid conservation credentials from around the state. Committee members were appointed by the attorney general for four-year terms,¹⁰ and the Committee met regularly in meetings open to the public. The Committee selected specific environmental matters for Public Intervenor intervention and became involved in the Office's litigation strategy and policy priorities. In the words of Dane County Executive Kathleen Falk, who served as a Public Intervenor from 1983 to 1995, "the strength of the public intervenor lay with its Citizen Advisory Committee, whose wisdom and perspective was larger than any one individual and enabled true integrity of the Office's decisionmaking process."¹¹

Notwithstanding its minimal size, the Public Intervenor's Office served as an important counterbalance to Wisconsin's DNR and other state agencies, which enacted policies pertaining to environmental matters. Reflecting upon the Office of the Public Intervenor, former Wisconsin Governor and United States Senator Gaylord Nelson noted in 1995 that "while extremely small within all of state government, the Office has played an extremely critical role in helping keep Wisconsin as one of the natural resource jewels of the country."¹² Indeed, in 1984, the Wisconsin State Legislature, with bipartisan sponsorship and support, acted affirmatively to clarify and to expand the Public Intervenor's role in Wisconsin by providing it with "authority to initiate actions and proceedings before *any* agency or court in order to raise issues, including issues concerning constitutionality."¹³ Clearly, Wisconsin lawmakers, in drafting the Public Intervenor Office's expansive mandate, recognized the high value Wisconsin citizens placed upon the protection and maintenance of their state's natural resources.

10. 1983 Wis. Act 410, *repealed by* WIS. STAT. § 165.076 (1995). As explained by former intervenor Thomas Dawson, the four-year terms of Citizen Advisory Committee members was begun by Attorney General Don Hanaway and continued by Attorney General Jim Doyle. Prior to that, the Citizen Advisory Committee members served at the pleasure of the attorney general.

11. Telephone Interview with Kathleen Falk, current Dane County Executive and former Public Intervenor (Oct. 7, 2003).

12. Gaylord Nelson, Address at Wisconsin State Capital with Governor Tommy Thompson and Wisconsin State Legislators present (Apr. 14, 1995).

13. WIS. STAT. § 165.075 (1995), *repealed by* 1995 Wis. Act 27 § 4450(d) (emphasis added).

III. CONTRIBUTIONS MADE BY THE PUBLIC INTERVENOR'S OFFICE

From 1967 to 1995, the Public Intervenor's Office fulfilled its mission as a champion of Wisconsin citizens' rights by successfully advocating on behalf of Wisconsin citizens in a number of important ways.¹⁴ In addition to providing an invaluable advisory function to Wisconsin legislators, agency rulemakers, and citizens, the public intervenors marshaled their resources to select and to litigate a limited number of precedent-setting cases through the court system. In this fashion, the Office could bring judicial scrutiny upon government agencies that failed to meet their obligations under state and federal law, thereby protecting the environment and public health in the process. Furthermore, the public intervenors' ability to build consensus between business interests and environmental groups not only mitigated citizen opposition to proposed development projects, but ultimately resulted in the enactment of intelligently drafted rules and regulations, which enabled Wisconsin's business community to bypass costly litigation and remediation.

A. The Public Intervenor's Office Was Both Legal Advocate and Champion of Public Rights

1. Through Citizen Support and Advocacy, the Public Intervenor's Office Championed the Public's Right to Enjoy and Protect Wisconsin's Natural Resources

By means of its Citizen Information and Assistance Program, the Public Intervenor's Office assisted hundreds of Wisconsin citizens every year with their questions and worries about environmental matters in their neighborhoods and home communities, including concerns over contaminated wells, noise and odor nuisances, leaking landfills, and property devaluation. Public intervenors advised citizens on how to use existing local and state laws to protect their families and property from environmental contamination and to preserve their rights in Wisconsin's natural resources.¹⁵ They further

14. Two public intervenors in particular had the most significant impact on the direction and efficacy of the Public Intervenor's Office: Thomas Dawson, who served as a Public Intervenor for nineteen years from 1976 to 1995, and Kathleen Falk, who served as a Public Intervenor for twelve years from 1983 to 1995. The level of dedication, skill, and intelligence possessed by these two individuals was confirmed in interview after interview.

15. Arlen Christenson, a long-time member of the Public Intervenor's Office's Citizen Advisory Committee and a University of Wisconsin Law Professor, explained the Office's role as follows: "We tell citizens how to cut red tape, what people to contact, what their rights are, what hearings they can get, where to turn for legal representation. A lot of our calls involve local government decisions as well as ones made by state bureaucracies." PUBLIC INTERVENOR OFFICE,

counseled citizens on how to avoid costly litigation by exploring alternatives to litigation, such as encouraging citizens to pack their town hall to advocate their positions before local town boards.¹⁶

In this fashion, the Public Intervenor's Office was able to provide information and legal backing to Wisconsin citizens who otherwise would have lacked the resources necessary to take on the state bureaucracy. Former Public Intervenor Kathleen Falk recalled many evenings, too many to count, that she spent in citizens' homes listening to their concerns and advising them on what legal recourse was available to them. "We went to people where they were, to try to be the most use to them," said Falk.¹⁷ One citizen member of an organization of Sauk County residents fighting in the 1990s for the clean-up of groundwater pollution caused by an army ammunition plant described the assistance provided by the Public Intervenor's Office in this way: "Our offices are our kitchen tables, our budget is the family budget, and our staff is our friends and neighbors, but each of us has a common adviser we can turn to, and that is the Public Intervenor."¹⁸

In addition to empowering citizens, the Public Intervenor's Office worked valiantly to champion the rights of Wisconsin citizens.

a. Upheld Rights of Communities

The Public Intervenor's Office defended the Town of Casey in Washburn County before the United States Supreme Court in *Wisconsin Public Intervenor v. Mortier*.¹⁹ The Office successfully argued for the right of local communities to reasonably regulate pesticide use with standards stronger than those mandated by federal law to protect citizens' health and the environment.²⁰

As another example, the public intervenors went to bat for the Town of St. Germain in Vilas County to defend the town's right to reasonably regulate the

HANDOUT, PUBLIC INTERVENOR ACCOMPLISHMENTS (1995) [hereinafter HANDOUT].

16. Written Comments of Thomas Dawson, current assistant attorney general and unit director for the Environmental Protection Unit of the Wisconsin Department of Justice and former Public Intervenor (Aug. 24, 2003).

17. Telephone Interview with Kathleen Falk, *supra* note 11.

18. Ron Seely, *Public Intervenor Praised*, WIS. STATE J., Feb. 28, 1995.

19. 501 U.S. 597, 600, 616 (1991).

20. *Id.* Beyond its defense of local government rights, the *Mortier* case also demonstrates the moderating influence of the Public Intervenor's Office. As described by Thomas Dawson in written comments dated August 24, 2003, the Town of Casey originally contacted the Public Intervenor's Office seeking to impose an ordinance totally banning the aerial application of pesticides due to concern for its citizens and the tourist industry. The public intervenors counseled against the total ban in favor of the more moderate approach of requiring a permit before aerial spraying.

clear-cutting of forests on its town roads to protect its tourist trade.²¹

b. Protected Navigable Waterways and Wetlands

The Public Intervenor's Office played a leading role in the development of rules to protect waterways and wetlands from nonmetallic mining operations. Responsive to public concern in the 1970s over the severe erosion and sedimentation damage to valuable trout streams in Marathon and Pierce Counties caused by unregulated sand and gravel mining operations, the public intervenor Peter Peshek toured damaged waterways and mining sites in these counties, observing miles upon miles of devastation.²² Intervenor Peshek thereafter petitioned the Natural Resources Board to develop rules for the regulation of nonmetallic mining, a petition that ultimately became the framework for the DNR's development of Administrative Code NR 340, adopted in 1979, which established the presumption that dredging near waterways has a negative environmental impact and requires the applicant both to prove otherwise and to demonstrate that a feasible alternative is not available.²³

The Public Intervenor's Office was also a leader in wetlands protection. First, the Office spurred the DNR to adopt rules requiring permits for wetland fill and destruction. Second, the Office urged the DNR to use its authority under the Clean Water Act to issue or deny water quality certification to Army Corps of Engineers CWA section 404 permits.²⁴

c. Preserved Wildlife

In a series of lawsuits filed in 1989–90 against the DNR, the Public Intervenor's Office successfully prevented a solid waste landfill from being established in the middle of the Machickanee Forest in Oconto County. The Public Intervenor introduced evidence to the circuit court showing that after the DNR had approved the county's application to withdraw landfill site lands from the County Forest Program, Oconto County purchased interest in a Marinette County municipal landfill that would be sufficient for Oconto County's municipal waste needs for the next twelve to eighteen years.²⁵ By presenting this evidence and involving itself in this matter, the Public

21. Dawson, *supra* note 16; see also HANDOUT, *supra* note 15.

22. Interview with Peter A. Peshek, public intervenor from 1976 to 1983 and current shareholder at Dewitt Ross and Stevens, S.C. (July 12, 2004).

23. *DNR Waterway and Wetland Handbook*, Wisconsin Department of Natural Resources, ch. 105, <http://www.dnr.state.wi.us/org/water/fhp/handbook/> (last visited Oct. 25, 2004).

24. Dawson, *supra* note 16.

25. *State Pub. Intervenor v. Wis. Dep't of Natural Res.*, 171 Wis. 2d 243, 246, 490 N.W.2d 770, 772 (Ct. App. 1992).

Intervenor's Office was instrumental in preserving the Machickanee Forest area for wildlife.

d. Ensured Lakefront Access

For many years during the 1980s, the Public Intervenor's Office, through the efforts of Kathleen Falk, successfully advocated for the rights of the public, including disabled citizens, to fish and recreate along Lake Michigan on the Summerfest grounds in Milwaukee.²⁶

2. The Public Intervenor Office's Legal Advocacy Safeguarded Citizens' Rights to Obtain Complete and Accurate Information

The Public Intervenor's Office worked to ensure that Wisconsin state government based its public policy decisions on accurate information and open public discourse. As will be illustrated in the following examples, the public intervenors worked hard to disseminate scientific and technical information to citizen groups, to retain and utilize experts, and to provide in-depth policy analyses to state legislators and regulators.

The Public Intervenor's Office also staunchly defended Wisconsin citizens' rights to permit notices and to participate in public hearings. Michael Cain, a staff attorney at the DNR for over twenty-five years, had a great deal of contact with the Public Intervenor's Office. Cain explained that "the Public Intervenor Office served an important role in providing the public with the mechanism by which they were able to voice their concerns over a particular project or piece of legislation and have them taken into consideration by a state office."²⁷

a. Environmental Impact Statements

In the 1991 case of *State Public Intervenor v. Wisconsin Department of Transportation*,²⁸ the Public Intervenor's Office brought suit against the Wisconsin Department of Transportation ("DOT") because the DOT failed to submit an Environmental Impact Statement along with its proposed \$184 million road building program in its 1991 budget. A Dane County Circuit Court judge ruled in the Public Intervenor Office's favor, requiring that the DOT prepare an Environmental Impact Statement along with any major transportation proposal submitted to the legislature.

As an additional result of this lawsuit, the Public Intervenor's Office and

26. Whitney Gould, *Festival Oversight Change Threatened Mayoral Aide*, MILW. J. SENTINEL, June 13, 1998, at B1.

27. Telephone Interview with Michael Cain, DNR staff attorney (Aug. 14, 2003).

28. 91CV001869 (Dane County Circuit Court filed May 13, 1991).

the DOT reached an agreement to expand public awareness and involvement in proposed transportation projects. In 1992 alone, nine public informational meetings were held around the state, providing information on proposed transportation plans, citizen question and answer time, and opportunities for public testimony to be taken and considered by the Department of Administration ("DOA") in budget development.²⁹

b. Protecting the Public's Right to Contested Case Hearings

In the 1981 case of *Town of Two Rivers v. Wisconsin Department of Natural Resources*,³⁰ the Public Intervenor successfully challenged the DNR's refusal to hold public hearings before proceeding with a determination of proposed solid waste disposal sites. In agreement with the Public Intervenor's position, the court of appeals ruled that "the citizenry enjoys a right to demand a hearing before that decision is made" and affirmed the circuit court's earlier order affording the public the opportunity to participate in contested case hearings concerning placement of the solid waste dumps.³¹

c. The Crandon Mine Experience

The Public Intervenor's expertise in evaluating environmental impacts and disseminating scientific and technical information to the public was also indispensable throughout the Crandon Mine permitting process. In 1975, an ore body of zinc and copper was discovered within a 100-foot-wide by one-mile-long slab of bedrock located about five miles south of Crandon, one mile south of Swamp Creek (a tributary of the Wolf River), and one mile upstream of the wild rice beds of the Mole Lake Chippewa Reservation.³² Flambeau Minerals Corporation sought mining permits from the Wisconsin DNR in the early 1980s but halted the lengthy permit process at the end of 1986, after the DNR had already completed an environmental impact statement and scheduled a final hearing date on the permit requests.

In February 1994, a new Wisconsin partnership called Crandon Mining Company, consisting of two international mining firms, Exxon Coal and Minerals Company and Rio Algom Limited, filed formal notice of intent to assess the mine's potential environmental effects, once again initiating the complicated permit process required to obtain the state, federal, and local permits needed to remove the fifty-five million tons of metal ore from the site. In evaluating the proposed mine's environmental impacts, Laura Sutherland,

29. *Meeting to Seek Input on Budget*, MILW. J., July 28, 1992.

30. 105 Wis. 2d 721, 725, 315 N.W.2d 377, 379 (Ct. App. 1981).

31. *Id.*

32. Don Behm, *Proposed Giant Mine Raises Fears*, MILW. J., Apr. 27, 1994, at A7.

the Assistant Attorney General assigned as a part-time Public Intervenor in this matter, hired top experts to meet the public's need for accurate information and to help predict and prevent contamination of the Wolf River and groundwater. Based upon these experts' findings, Sutherland provided written comments to the DNR in April 1994, calling attention to, among other concerns, the fact that up to 2000 gallons of water per minute would have to be pumped out of the proposed mine's shaft in order to prevent flooding of the mine, impacting groundwater and surface water resources.³³ With the additional potential release of mine waste water in the amount of up to 3000 gallons per minute into Swamp Creek and downstream to the Wolf River, the Office of the Public Intervenor further cautioned against the harm such discharges would have on fish and, thereby, on Wisconsin's tourist industry in the surrounding counties.³⁴

B. The Public Intervenor's Office Was Both Legislative Advisor and Bureaucratic Partner

1. The Public Intervenor's Office Advanced Environmental Rules and Legislation

Armed with their legal expertise and backed by their Citizen Advisory Council, the public intervenors provided an invaluable resource to Wisconsin legislators and agency rulemakers, aiding their efforts to enact laws and rules responsive to Wisconsin citizens' environmental, health, and property concerns. The public intervenors helped Wisconsin legislators while furthering citizens' public rights. The intervenors worked behind the scenes in public meeting halls, corporate boardrooms, and legislative chambers to build citizen and legislative support for the passage of landmark laws in Wisconsin, including the following:

a. DDT Ban

The Public Intervenor's Office was the first to take legal action against DDT. Subsequently, Wisconsin became the first state in the country to ban DDT,³⁵ setting the stage for the national ban on DDT in 1973.

b. Employees' Right to Know Law

The Public Intervenor's Office played an important role in supporting the enactment of the Employees' Right to Know law in 1982, which requires all

33. *Id.*

34. *Id.*

35. WIS. STAT. § 94.709 (2000).

public sector employers in Wisconsin to inform workers about toxic substances, infectious agents, and pesticides used in the workplace.³⁶ This Wisconsin law became the model for federal legislation, the Emergency Planning and Community Right-to-Know Act,³⁷ passed in 1986, which seeks comparable protection of workers and citizens at the federal level.

c. Acid Rain Legislation

In 1986, Wisconsin became the first state to pass a law to control acid rain.³⁸ The law required Wisconsin's major electrical utility companies to cut in half their 1980 emission levels of sulfur dioxide by 1993.³⁹

d. Wisconsin Groundwater Law

The public intervenors were instrumental in framing this 1984 law in response to significant public concern in the 1980s arising from the discovery of widespread groundwater contamination by the carcinogenic potato herbicide Aldicarb.⁴⁰ Wisconsin's 1984 Groundwater Law,⁴¹ still "hailed as the most comprehensive program for managing and protecting groundwater in the United States,"⁴² protects Wisconsin's groundwater, the source of drinking water for over 75% of Wisconsin's residents and nearly all of its rural residents.⁴³ The law set an Enforcement Standard ("ES") and Preventive Action Level for each groundwater contaminant.⁴⁴ It also established a mechanism for groundwater monitoring and subsequent legal actions when contamination levels exceeds the ES.⁴⁵

e. Protecting Wisconsin's Drinking Water

In 1994, the DNR sought to revise Wisconsin rules regarding drinking water standards for certain chemicals like Xylene and Toluene. Upon being

36. WIS. STAT. § 101.581 (2000).

37. 42 U.S.C. 1 §§ 11001-11050 (1986).

38. WIS. STAT. § 285.43(1) (2000), as created by 1985 Wis. Act 296 § 25; WIS. STAT. § 285.45(2)-(3) (2000), as created by 1985 Wis. Act 296 § 26.

39. *Acid Rain in Wisconsin*, Wisconsin Department of Natural Resources, <http://www.dnr.state.wi.us/org/aw/air/health/acidrain.htm> (last visited Oct. 25, 2004) (originally published in the DNR Booklet, *Acid Rain in Wisconsin*, publication AM-129-94).

40. *Pesticide Update*, Wisconsin Stewardship Network, <http://www.wsn.org/pesticideupdate2.html> (last visited Oct. 25, 2004).

41. WIS. STAT. § 160.001-160.50 (2003).

42. David Johnson & Laura Chern, *Walking on Water*, WIS. NAT. RESOURCES MAG., June 1998, at 6.

43. *Pesticide Update*, *supra* note 40.

44. *Id.*

45. *Id.*

notified that the standards being recommended by the DNR as “permissible levels” of these chemicals would result in unacceptably odorous drinking water, Thomas Dawson, who served as a Public Intervenor from 1976 to 1995, investigated.⁴⁶

Dawson first commissioned the assistance of the State of Wisconsin Laboratory to prepare samples of water containing Xylene and Toluene at the levels authorized by the DNR’s proposed rule. Upon personally experiencing the strong odor of the Lab’s water samples, which in Dawson’s words “smelled just like model airplane glue,” Dawson went before the DNR Board informally and cautioned against its acceptance of the revised water standards.⁴⁷

After the DNR Board refused to heed the Public Intervenor’s concerns and instead accepted the revised rules, Public Intervenor Dawson testified at the hearings before the legislature. Bringing with him the state lab samples he had commissioned, which contained water that was plainly odorous, Thomas Dawson asked the assembled legislators the following question:

The DNR says this is water that is acceptable to drink. Is this the kind of water that you think the people in Wisconsin should be given to drink? The kind of water you would expect a mother in Wisconsin to put in a bottle along with formula for her baby?⁴⁸

The legislators, many of whom were blatantly angry at the noxious smell of the drinking water, voted to reject the DNR Board’s decision approving the proposed water standards and decided to send the rule back to the DNR for revision.

f. Nonmetallic Reclamation Bill

This 1994 bill, supported and promoted by the Public Intervenor’s Office, required the establishment of standards for the restoration of gravel pits, stone quarries, and other nonmetallic mineral extraction sites in Wisconsin. These measures prevent companies from abandoning such sites and creating safety hazards and diminished property values to nearby landowners.⁴⁹

The public intervenors also assisted Wisconsin legislators by responding

46. Interview with Thomas Dawson, current Assistant Attorney General and Unit Director for the Environmental Protection Agency of the Wisconsin Department of Justice and former Public Intervenor (July 17, 2003).

47. *Id.*

48. *Id.*

49. WIS. STAT. §§ 30.19, 30.195, 30.20 (2004); *see also* WIS. ADMIN. CODE §§ NR 340.01–10 (2004).

to frequent requests by members of the assembly, the senate, and committee chairs. The Office was asked to provide legal opinions and testimony concerning rule revisions proposed by state agencies such as the DNR, DOT, and the Public Service Commission ("PSC"). In this fashion, the Public Intervenor's Office functioned in the manner of a think tank, as it was involved in the analysis of public policy and provided a political counterweight to private interests and lobbyists.

Indeed, under their legislative mandate,⁵⁰ the public intervenors enjoyed the unique status of being a respected government player, on equal footing with other state agencies like the DNR and PSC. However, the Office also had the ability to legally challenge these agency actions. This status, coupled with the Public Intervenor Office's perception as an objective party, ensured that the public intervenors were always provided "a place at the table" at agency and legislative hearings where their very presence often promoted a more balanced and functional discourse.

2. The Public Intervenor Office's Advocacy Efforts Protected Wisconsin Citizens' Right to an Accountable and Effective Government

In keeping with Wisconsin's populist roots, the Public Intervenor's Office worked to ensure a Wisconsin state government that complied with established law, not a state government beholden to special interests. As stated by Kathleen Falk, "because government is only as good as its citizens, the public intervenors' most important role was making government accountable."⁵¹ To this end, the public intervenors focused their litigation and advocacy efforts on governmental bodies, not private individuals or businesses. Specifically, the Office focused on the government's failure to enforce existing state and federal laws aimed at protecting the environment or the health and safety of Wisconsin citizens.

Certainly, the public intervenors' active role in advocating for public rights, coupled with its power to sue, had a significant impact on Wisconsin's DNR. George Meyer, who led the DNR's Enforcement Division from 1980 to 1993 and who was the DNR secretary from 1993 to 2001, noted that the Public Intervenor's Office helped the DNR optimize its objectives in a number of important ways. In public trust cases, for example, where the DNR "was outgunned," DNR staff attorneys were helped immeasurably by having the public intervenors in their camp. The intervenors helped to prepare the case, obtain expert witnesses, and drum up public support and participation in

50. See Kellett Bill, *supra* note 5 and accompanying text.

51. Telephone Interview with Kathleen Falk, *supra* note 11.

administrative law proceedings.⁵² Meyer additionally recognized the public intervenors' ability to proceed with enforcement actions when the DNR could not; often the DNR found itself "locked in politically."⁵³ For example, the DNR was forestalled from going after state agencies such as the DOT or the DOA; conversely, the Public Intervenor's Office could proceed against these agencies for their violations of state laws without recourse and, in fact, was instructed to do so under the Office's 1984 legislative mandate. Indeed, the very presence of the Public Intervenor's Office helped drive the DNR internally, as DNR employees could point to the Office and its ability to sue in order to convince DNR administrators "to get things done that normally wouldn't get done within a bureaucracy."⁵⁴

With respect to the DNR's rulemaking process, Meyer further praised the public benefit provided by the public intervenors' presence on the DNR's Technical Advisory Committees. According to Meyer, the public intervenors' participation on these committees provided a necessary counterweight to industry and manufacturing representatives; the Office's status as a governmental agency prevented them from being marginalized in the manner of other environmental voices.⁵⁵ In this fashion, the public intervenors helped to ensure balanced communication and a moderate approach with respect to the particular policy matter or rule pending before the DNR.

In addition, the very presence of the Public Intervenor's Office helped keep Wisconsin's legislative process accountable by deterring legislators' attempts to insert special interest statutes as part of state budget legislation. As Meyer acknowledged, if legislators were to attempt to reward their constituents with special interest laws, the vigilance of the public intervenors would ensure that those "legislators would be buying [their constituents] a lawsuit" instead.⁵⁶

C. The Public Intervenor Office's Role As a Consensus Builder Provided Important Benefits to Wisconsin's Business Community

1. The Public Intervenor's Office Reduced Legal Uncertainty

One of the many ways that the Public Intervenor's Office provided a benefit to the business community was the manner in which the public

52. Interview with George Meyer, current Wisconsin Wildlife Federation Executive Director and former DNR Secretary (Aug. 5, 2003).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

intervenor's advisory and consensus-building capacities lessened the risk of litigation. With the help of the Public Intervenor in the rulemaking process, Wisconsin laws and regulations were less likely to be subject to a series of major revisions and, therefore, less likely to be contested. Indeed, according to former Public Intervenor Thomas Dawson, as a result of the public intervenors' work with state agencies to draft environmentally appropriate regulations, Wisconsin business leaders and representatives had the opportunity to provide input, enabling an exchange of ideas that led to the enactment of intelligent regulations.⁵⁷ One of the best examples of this cooperation is Wisconsin's 1984 Groundwater Law, where the Public Intervenor's Office worked closely with business interests to develop a public policy that provided environmental protection for Wisconsin citizens while ensuring regulatory certainty for the business community.⁵⁸

Donald Gallo, an environmental lawyer who has represented a variety of business, industrial, and governmental entities including the DOT, agreed with the public intervenors' contributions in this respect: "From the business point of view, the process has resulted in a more certain and consistent regulatory framework. It means minimizing risks associated with legal uncertainty, which translates into less costly regulation and a lower probability of facing environmental lawsuits."⁵⁹

Kenosha mayor John Antaramian similarly praised the Public Intervenor's Office. While proceeding with redevelopment plans for his city's lakefront, the mayor actively sought out the intervenors' opinions, reasoning, "[t]here are many times I prefer to deal with the intervenor than with narrow interest groups. On this [lakefront] site, we did not have to bring them in, but wanted to avoid lawsuits further down the road after considerable investment has been put into the project."⁶⁰

2. The Public Intervenor's Office Served As an Industry Problem Solver

Due to their unique status, public intervenors were often able to facilitate compromises between business objectives and environmentalist concerns. As stated by former Public Intervenor Thomas Dawson, "[t]he Public Intervenor's Office was duty bound to carry out its job, which was to protect

57. Interview with Thomas Dawson, *supra* note 46.

58. As recalled by Kathleen Falk in an October 7, 2003 telephone interview with the author, former intervenor Thomas Dawson's work in developing new sand and gravel regulations demonstrated both Dawson's exceptional ability to find common ground and the Public Intervenor Office's success in securing the adoption of environmentally protective regulations that industry could live with. WIS. STAT. § 160.001-160.50 (2003).

59. John Paulus, *Environmental House Cleaning*, CORP. REP. WIS., June 1995, at 4.

60. *Id.*

Wisconsin's environment, but not necessarily to stop a particular project, which was often the objective of environmental groups."⁶¹ To this end, the public intervenors sought to "maximize the middle ground" by exploring less damaging alternatives, and by recommending protective measures that could be undertaken by developers and businesses at nominal expense compared to the cost of protracted litigation.⁶²

a. Lowes Creek in Eau Claire

For example, environmentalists strongly opposed a development project in Eau Claire on the basis of its potential to damage a major trout stream called Lowes Creek. The Public Intervenor's Office filed suit to protect the waterway but simultaneously extended its hand to the City of Eau Claire to try to reach a compromise. Thereafter, the Public Intervenor's Office and the City of Eau Claire entered into a settlement agreement that permitted the development to go forward with an eye toward the environmentalists' concerns. Ultimately, settlement basins were constructed to avoid water quality degradation, and the developers' goals were fully realized. The result achieved, in the words of former Public Intervenor Thomas Dawson, was "a win-win" situation.⁶³

b. Mining Operations

Likewise, the Public Intervenor's Office worked with industry, agencies, and legislators for years to develop environmentally sound legislation and rules governing mining operations in Wisconsin. For example, with respect to the Kennecott mine near Ladysmith, the Public Intervenor's Office withdrew from active participation in the application hearing process after several years of communications with the mining company. This withdrawal came as a result of a discovery made by the intervenors' expert hydrogeologist, who determined that the mining company had implemented reasonable methodologies to predict future groundwater impacts and to meet Wisconsin groundwater standards.⁶⁴ While other citizen and environmental groups remained opposed to the mine and sued the DNR, the Public Intervenor's Office did not.

61. Interview with Thomas Dawson, *supra* note 46.

62. *Id.*

63. *Id.*

64. Minutes of May 8–9, 1990 Citizen Advisory Committee Meeting, Department of Justice Memorandum, June 7, 1990.

c. Prairie du Chien Harbor Dock

Another example of the Public Intervenor's Office functioning as a problem solver includes the conflict between environmentalists and industry regarding the Prairie du Chien harbor dock in the east channel of the Mississippi River. In the 1990s, environmentalists sought to shut down the harbor dock due to the adverse effect of barge traffic on endangered species, including endangered mussel species. Prairie du Chien business and commercial interests, on the other hand, sought to upgrade and expand the harbor facilities to meet the need for continued growth and development. In 1992, the Public Intervenor's Office once again was able to negotiate a compromise that avoided litigation. In this case, the Office urged the consolidation of the harbor away from the habitat of the endangered species.⁶⁵

d. Riverwalk Guidelines

The Public Intervenor's Office, together with the DNR, worked out a set of guidelines in 1991–92 that permitted wide scale development along Milwaukee's Riverfront. The guidelines protect public access to the river and meet public trust concerns relating to the river itself. Businesses and developers along Milwaukee's Riverfront benefited greatly from the public intervenors' participation in this complicated process.⁶⁶

3. The Public Intervenor's Office Helped Wisconsin's Tourism Industry

With Wisconsin's thousands of inland lakes, miles of rivers, and beautiful landscape, it comes as no surprise that tourism has consistently ranked as the state's second largest industry, accounting for \$5.7 billion per year in 1994 and up to \$11.7 billion per year according to the latest calculation in 2002.⁶⁷ Wisconsin is home to thousands of resorts, lodges, and camping grounds, which cater to tourists seeking enjoyment from fishing, hunting, canoeing, and camping. Quite clearly, these activities depend on the quality, viability, and scenic beauty of the state's natural resources. As illustrated in the chart below for 1994, the year prior to the Public Intervenor Office's elimination in 1995, there can be little doubt that the Public Intervenor's Office provided a substantial financial benefit to thousands of Wisconsin's businesses involved in the tourism industry through its environmental advocacy efforts on behalf of public rights.

65. Memorandum from Thomas Dawson & Kathleen Falk to the Legislative Fiscal Bureau (Apr. 10, 1995); Telephone Interview with Michael Cain, *supra* note 27.

66. *Id.*

67. 2002 County Economic Profiles, Wisconsin Department of Tourism, <http://agency.travelwisconsin.com/Research/research.shtm>.

A 1994 SNAPSHOT: GIVING CREDIT WHERE CREDIT IS DUE	
Intervenor Action	Tourist Spending in 1994 ⁶⁸
Blocked the expansion of the Kidney Island Sludge Containment Facility in Green Bay Harbor, thereby preventing toxic dredgings from affecting water quality and fish viability in the more than 100 miles from Green Bay at the mouth of the Fox River to Door County's Washington Island.	Tourists spent \$237.8 million in Brown County and \$174.1 million in Door County, ranking them No. 5 and No. 7, respectively, among the top 10 Wisconsin counties in terms of tourism revenues.
Reached consensus with highway construction companies to preserve Fish Creek Slough, an 835-acre wetland west of Ashland in Bayfield County that merges with Chequamegon Bay and is an important fishery area for Lake Superior.	Tourists spent \$83.5 million in Ashland and Bayfield Counties.
Prevented storm sewer runoff from contaminating Lowes Creek, a major trout stream in the Eau Claire area.	Tourists spent more than \$146 million in Eau Claire and Chippewa Counties.
Monitored the Crandon-area mining project, protecting the Wolf River and its surrounding areas from any adverse environmental impact.	Tourists spent \$55.3 million on tourism related to the Wolf River in the Northeast Wisconsin counties of Forest, Oconto, and Langlade. ⁶⁹

68. Dan Hanley, *Public Intervenor's Protect Sporting Paradise*, MILW. J. SENTINEL, May 16, 1995.

69. Davidson-Peterson Associates, *The Economic Impact of Expenditures by Travelers on Wisconsin*, Calendar Year 2002, Highlight Summary, (Wisconsin Department of Tourism 2003).

It is in consideration of these and many other successful efforts on the part of the Public Intervenor's Office to safeguard Wisconsin's natural resources and tourist spending that many Wisconsin businesspeople and citizens questioned the elimination of the Public Intervenor's Office. The Office's annual cost to the state budget in 1994 comprised \$232,000—far less than 1% of the \$5.76 billion in tourist spending at stake.⁷⁰

IV. THE VOID CREATED BY THE LOSS OF THE PUBLIC INTERVENOR'S OFFICE

In the 1995–96 state budget, in a purported effort to “streamline government,” Governor Thompson and the Wisconsin Legislature made radical changes to Wisconsin's ability to address environmental issues. First, the secretary of the DNR became a governor-appointed and governor-controlled position, thereby removing the DNR from the control of the Natural Resources Board (an independent citizen committee composed of citizens appointed to six-year terms). The second major change enacted by the 1995–96 state budget bill was the de facto elimination of the Public Intervenor's Office. The Office was cut down to one attorney with no secretarial support, and moved out of the Department of Justice (“DOJ”) and into the DNR's Bureau of Legal Services. Most significantly, the Office was deprived of its power to sue on behalf of Wisconsin's citizenry.⁷¹ This shadow of a Public Intervenor's Office, already rendered powerless without its ability to sue or enforce environmental protections, was abolished quietly a few years later by the legislature.⁷²

Since the Office's elimination, an extensive and varied array of citizens have sought its reinstatement, including hunting and fishing groups, AFL-CIO members, DNR workers, business organizations, environmental activists, and politicians. For example, in a survey of DNR workers conducted in 2000 by Public Employees for Environmental Responsibility, two-thirds of the 1061 respondents wanted the Public Intervenor's Office restored.⁷³ Likewise, at the Wisconsin DNR Conservation Congress hearings held statewide on April 13, 2000, Congress voters recommended by a 6591 to 981 margin that the Public Intervenor's Office be reinstated.⁷⁴ More recently, State Attorney General

70. See Hanley, *supra* note 68.

71. *The History of the Public Intervenor's Office: A Broken Promise*, Wisconsin Stewardship Network, <http://www.wsn.org/issues/PIOhistory.html>.

72. *Id.*; see Kellett Bill, *supra* note 5 and accompanying text.

73. *DNR Watch: Research Report No. 7*, Wisconsin Stewardship Network, <http://www.wsn.org/issues/DNRwatch7.html> (citing the 2000 survey of Wisconsin DNR employees conducted by Public Employees for Environmental Responsibility).

74. Doug Hissom, *Environmental Watch: Voters Say Free the DNR Secretary*, SHEPHERD EXPRESS METRO, April 27, 2000, available at <http://www.shepherd-express.com/shepherd/21/18/>

Peg Lautenschlager voiced her support for Assembly Bill 46, a bill currently seeking the restoration of the Public Intervenor's Office. As Lautenschlager stated:

I believe the elimination of the Public Intervenor's Office in 1995 was a mistake. Although this action was taken under the guise of streamlining government and eliminating duplication, I couldn't disagree more with the contention by opponents of the Office of the Public Intervenor that these critical environmental issues are being given the same resources or attention today—they clearly are not.⁷⁵

In statements during his campaign and to the press since his election, Wisconsin Governor Jim Doyle has also voiced his support for the restoration of the Public Intervenor's Office.⁷⁶ In light of Assembly Bill 46 and its many supporters, it will be important to assess the significant void created in Wisconsin by the loss of the state's Public Intervenor's Office. The following Sections discuss some of the significant voids created by the loss of the Public Intervenor's Office.

A. The Public Intervenor Office's Ability to Provide Top-Notch Scientific, Technical, and Legal Information and Expertise Has Been Sorely Missed in Matters of Environmental Importance to Wisconsin Citizens

Who is defending the Public Trust Doctrine in Wisconsin? To do so on their own, Wisconsin citizens need to know the law, need money and resources, and need to be timely with respect to statutes of limitation, notification deadlines, and hearing dates. The following examples demonstrate the daunting and expensive task facing Wisconsin citizens without the assistance of the public intervenors.

1. Kidney Island Dredge Spoils Containment Facility in Green Bay

In 1988, the Public Intervenor's Office successfully blocked the expansion of a toxic PCB dump in Green Bay Harbor called Kidney Island.⁷⁷ The Office sought a contested case hearing before an administrative law judge to challenge the DNR's approval of the facility's expansion proposal and the subsequent grant of water quality certification.⁷⁸ In agreement with the public

scoop/environment_watch.html#Voters (last visited Oct. 25, 2004).

75. Press Release, Wisconsin Department of Justice (Apr. 1, 2003); *see also Restore Intervenor Position*, WIS. RAPIDS DAILY TRIB., Apr. 2, 2003.

76. Ron Seely, *Doyle Plans Big Changes for DNR*, WIS. STATE J., Dec. 3, 2002, at A1.

77. *Wis. Pub. Intervenor v. Wis. Dep't of Nat. Res.*, 184 Wis. 2d 407, 515 N.W.2d 897 (1994).

78. *Id.*

intervenors' position, the hearing examiner reversed the DNR's grant of certification noting the potential for damaging water quality in Green Bay.⁷⁹ The court also noted that the DNR failed to comply with Wisconsin law concerning the grant of certification in a contested case.⁸⁰

A mere two weeks after the Public Intervenor's Office was eliminated, the DNR reissued a permit to expand the Kidney Island facility in Green Bay Harbor. Again, the DNR did not provide Green Bay citizens with the opportunity for public hearings. In contrast to the 1988 proceedings, the citizens of Green Bay had to proceed without the help and expertise of the public intervenors and, as a result, were forced to spend nearly \$15,000 of their own money to obtain protection of their public rights and the enforcement of state law. In addition, vast amounts of taxpayer dollars were wasted by the state in refighting the same issue.⁸¹ Ultimately, in 1998, the matter was resolved before an administrative law judge who overturned the DNR's decision to expand the PCB dump in Green Bay, thereby upholding the Public Intervenor Office's earlier victory.⁸²

2. Crandon Mine

Prior to the Office's elimination in 1995, the public intervenors had retained three experts to evaluate and inform the public of the potential environmental impacts attendant to the proposed Crandon mining operation. Since the Office's elimination, citizens have been forced to either rely upon mining representatives for information or obtain information at their own expense and effort.⁸³

3. Power Line Between Duluth and Wausau

The Public Intervenor Office's expertise would be invaluable in assessing the environmental impact of the proposed 250-mile-long transmission line between Duluth and Wausau. As the proposal calls for the clearing of a 150-foot-wide swath of land for the distance of the line, thousands of properties and thousands of acres of wildlife habitat will be impacted. Without the Office, citizens have had to assess the potential environmental impact by means of their own resources, which are far less than those available to the large corporate proponents of the project.

79. *Id.*

80. *Id.*

81. Don Behm, *Groups Push to Restore Independence for DNR Chief*, MILW. J. SENTINEL, Apr. 19, 1998, at 1A.

82. *Id.*; see also *State of the State's Environment: 1998*, Wisconsin Stewardship Network, <http://www.wsn.org/issues/stateofstate.html>.

83. Telephone Interview with Kathleen Falk, *supra* note 11.

B. Without the Public Intervenor's Office, Wisconsin Citizens' Right to an Accountable Government Has Been Placed in Jeopardy

Following the elimination of the Public Intervenor's Office in 1995, the costly and time-consuming burden of bringing Wisconsin state entities to task for failing to uphold existing environmental and constitutional laws has fallen to private Wisconsin citizens, or to no one at all.

1. Wisconsin Citizens Have Had to Go It Alone in Efforts to Oppose Detrimental Special Interest Provisions in State Budget Bills

In the years since the Public Intervenor Office's elimination, Wisconsin's legislature has introduced numerous provisions that violate state environmental protections. These provisions were introduced as part of the state budget or as special interest statutes. Because the DNR and the DOJ have no standing to object to the constitutionality of these special interest statutes, the full burden of litigating these public trust matters has fallen on the shoulders of Wisconsin citizens and privately funded environmental groups.

a. The City of Oak Creek Litigation: Pre- and Post-Public Intervenor

In 1994, the Public Intervenor challenged the constitutionality of a statute, included as part of the 1991 budget bill, which specifically exempted the city of Oak Creek from having to restore Crayfish Creek to its natural state.⁸⁴ The city had illegally placed a concrete structure in the waterway.⁸⁵ The Public Intervenor's Office objected to this special interest statute on constitutional grounds and the Wisconsin Court of Appeals agreed. The court noted that the statutory exemption had been drafted by the Joint Finance Committee as part of the 1991 budget bill encompassing over 700 pages of session laws, without prior introduction before the legislature, and without any public hearings held on its content. Consequently, the court reasoned that it could not be assured that the statute had not been "smuggled or logrolled through the legislature without the benefit of deliberative legislative consideration."⁸⁶

In 1996, however, one year after the elimination of the Public Intervenor's Office, the legislature passed another bill that again sought to exempt Oak Creek from having to remove the concrete structure from Crayfish Creek. Given the absence of the public intervenors, the state's attorney general brought an action against this special statutory exemption, claiming that it was

84. *City of Oak Creek v. Wis. Dep't of Nat. Res.*, 185 Wis. 2d 424, 518 N.W.2d 276 (Ct. App. 1994).

85. *Id.*

86. *Id.* at 439, 518 N.W.2d at 280 (citing *Davis v. Grover*, 166 Wis. 2d 501, 522, 480 N.W.2d 460, 467 (1992)).

unconstitutional and a public nuisance. Whereas the circuit court found that the attorney general had standing to bring the action, the court of appeals reversed the decision, holding that “the attorney general lacked the necessary statutory authority to challenge the constitutionality of the statute in this case.”⁸⁷ The Wisconsin Supreme Court affirmed, starkly highlighting the void left by the Public Intervenor’s Office. The court concluded that because the attorney general lacked standing to attack the statute’s constitutionality, the statute’s presumed constitutionality remained.⁸⁸

b. Silver Lake: No DNR Standing

When property owners on Silver Lake in Waushara County complained that the DNR’s determination of the ordinary high water mark resulted in a loss of beach real estate, legislators sponsored provisions to help the property owners. The DNR challenged the constitutionality of these statutes on the basis of their violation of the Public Trust Doctrine, and the circuit court agreed. However, in *Silver Lake Sanitary District v. Wisconsin Department of Natural Resources*,⁸⁹ the Court of Appeals rejected the DNR’s argument that it should be permitted to challenge a statute’s constitutionality if an issue of great public concern was presented.⁹⁰ The court ruled that in the absence of a private litigant, “the DNR had no standing” to contest the constitutionality of any statute, including those at issue bearing upon the determination of high water marks in Wisconsin lakes.⁹¹

c. Ashley Furniture

Five statewide environmental groups invested tens of thousands of dollars and countless hours to defeat a wetland exemption for Ashley Furniture Industries. The exemption was written into the 1999 state budget bill and would have resulted in the destruction of two high-quality wetlands. After a three-year effort, which included a massive publicity campaign and a lawsuit, the exemption was defeated in August 2001.⁹²

87. *State v. City of Oak Creek*, 2000 WI 9, ¶ 11, 232 Wis. 2d 612, 605 N.W.2d 526 (Ct. App. 1998).

88. *Id.* at ¶ 55, 232 Wis. 2d 612, 605 N.W.2d 526.

89. 2000 WI App 19, 232 Wis. 2d 217, 607 N.W.2d 50 (Ct. App. 2000).

90. *Id.*

91. *Id.*

92. Charlie Luthin, *Governor Vetoes Ashley Wetland Exemption*, WISCONSIN STEWARDSHIP NETWORK, July 27, 2002, <http://www.wsn.org/wetlands/ashleyveto.html>; Interview with Thomas Dawson, *supra* note 46; Interview with George Meyer, *supra* note 52.

2. Wisconsin's DNR Has Demonstrated Shortcomings in the Enforcement of State and Federal Environmental Laws

As previously discussed, simultaneous with the elimination of the state's Public Intervenor's Office, the 1995–96 budget bill significantly altered the structure and makeup of Wisconsin's DNR.⁹³ In addition to granting the governor direct control over the DNR secretary, the DNR suffered severe budget cuts, reorganization, and the elimination of more than 400 staff across the state. These cuts, together with a corresponding decline in morale, has undermined DNR enforcement of environmental laws. The number of cases that the DNR referred to the DOJ for prosecution significantly declined in the years immediately following the DNR's reorganization.⁹⁴ Assistant Attorney General JoAnne Kloppenburg explained the drop as a consequence of the great uncertainty and dislocation that the DNR experienced when it was made a cabinet agency; the reorganization took people away from their prior areas of expertise and experience.⁹⁵

While DNR case referrals have returned to historic levels in several areas in the years since, there remains a continuing reduction in hazardous waste referrals due almost entirely, in Kloppenburg's view, to staffing and resource shortages, as hazardous waste violations require regular onsite inspections for which DNR staff have had neither the time nor the resources.⁹⁶ For similar reasons, the DNR in 1999 failed to inspect up to 53% of all major industrial facilities with a Wisconsin Pollutant Discharge Elimination System permit in contrast to the DNR's perfect inspection record for these facilities from 1990 to 1994.⁹⁷ Given these enforcement issues and the additional budget and staff cuts that the DNR has been forced to sustain, Wisconsin citizens have had no recourse in the years since the Public Intervenor Office's elimination other than to mobilize their own resources to try to hold the DNR accountable for the enforcement of environmental laws.

93. See Kellett Bill, *supra* note 5.

94. Wisconsin Department of Justice, Environmental Protection Unit Case Assignments by Program, 1990 through September 2003.

95. Interview with JoAnne Kloppenburg, Assistant Attorney General (Oct. 10, 2003); Written Comments of JoAnne Kloppenburg, Assistant Attorney General (Oct. 10, 2003) (on file with author).

96. See Interview with JoAnne Kloppenburg, *supra* note 94.

97. Melissa Scanlan & Christa Westerberg, *Who Is Guarding Our Waters? A Report on the Wisconsin DNR's Enforcement of Water Pollution Laws*, Midwest Environmental Advocates (2001).

V. CONCLUSION

There can be no denying that the Public Intervenor's Office provided a tremendous benefit to Wisconsin citizens during the Office's tenure from 1967 to 1995. Notwithstanding their impressive number of legal victories, many would argue that the Office's greatest accomplishments took place outside the litigation context—in the invaluable assistance that it provided legislators and agency rulemakers as well as in the benefit that it provided Wisconsin business interests and environmental groups in building consensus on matters of environmental concern.

Since the Office's elimination in 1995, Wisconsin citizens, lawmakers, and bureaucrats have been at a loss. Without the intervenors' counterbalance to Wisconsin's DNR and other state agencies, the enforcement of state and federal laws has declined and citizens have had to go it alone in their efforts to seek expert information or oppose special interest statutes buried within state budget bills. Without the public intervenors' participation on technical advisory committees, testimony before legislative committees, and outreach to business, industry, and environmental leaders, necessary environmental regulations and legislation have become bogged down in committee. The elimination of this champion of the public trust has left a conspicuous void in Wisconsin's environmental arena and the findings of this Essay certainly argue for the restoration of the Public Intervenor's Office in Wisconsin.